JUDGMENT OF THE COURT (Sixth Chamber)

3 February 2000 *

In Case C-207/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Landesarbeitsgericht Mecklenburg-Vorpommern (Germany) for a preliminary ruling in the proceedings pending before that court between

Silke-Karin Mahlburg

and

***Land* Mecklenburg-Vorpommern**

on the interpretation of Article 2(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40),

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: P.J.G. Kapteyn (Rapporteur), acting for the President of the Sixth Chamber, G. Hirsch and H. Ragnemalm, Judges,

Advocate General: A. Saggio,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Ms Mahlburg, par K. Bertelsmann, Rechtsanwalt, Hamburg,

— the Finnish Government, by T. Pynnä, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by P. Hillenkamp, Legal Adviser, and M. Wolfcarius, of its Legal Service, acting as Agents, and T. Eilmansberger, of the Brussels Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of Ms Mahlburg and of the Commission at the hearing on 3 June 1999,

after hearing the Opinion of the Advocate General at the sitting on 7 October 1999,

gives the following

Judgment

1 By order of 16 April 1998, received at the Court on 2 June 1998, the Landesarbeitsgericht (Higher Labour Court) Mecklenburg-Vorpommern referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Article 2(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40, 'the Directive').

2 That question was raised in proceedings between Ms Mahlburg and the *Land* Mecklenburg-Vorpommern concerning the latter's refusal to employ Ms Mahlburg under a contract for an indefinite period on the ground that she was pregnant and therefore could not, from the outset, take on the functions envisaged for the post in question.

Legal background

Community law

3 Article 2 of the Directive provides:

'1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsover on grounds of sex either directly or indirectly by reference in particular to marital or family status.

...

3. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

...'

German law

4 Paragraph 611a of the Bürgerliches Gesetzbuch (German Civil Code, 'the BGB') was introduced in 1980 in order to transpose the Directive into German law and provides *inter alia*:

'An employer may not discriminate against an employee on grounds of sex under any agreement or measure, in particular when initiating the contractual relationship, in connection with promotion, when giving instructions and in connection with dismissal.'

5 The relevant provisions of the Mutterschutzgesetz (Law on the Protection of Working Mothers) of 24 January 1952 (BGBl. I, p. 315) are Paragraphs 3 to 5.

6 Paragraph 3 of the Mutterschutzgesetz provides:

'1. Pregnant women must not be employed if, as attested by a medical certificate, the life or health of the mother or child will be jeopardised if the mother continues to work.

...'

7 Paragraph 4 of the Mutterschutzgesetz, which lists other prohibitions on employment, states:

'1. Pregnant women must not be assigned to heavy physical work or to work exposing them to the harmful effects of substances or rays, dust, gases or steam, heat, cold or humidity, vibrations or noise that pose a risk to health.

2. In particular pregnant women must not be assigned to

1. work involving the regular lifting, moving or carrying, without mechanical assistance, of loads of more than 5 kg or, on occasion, of loads of more than 10 kg. If heavier loads must be lifted, moved or carried with mechanical assistance, the physical effort required of the pregnant woman must not be greater than that required for the work referred to in the first sentence.

...

3. work frequently requiring a considerable amount of bending and stretching or continual crouching or stooping.

...

6. work exposing them to a particular risk, as a result of their pregnancy, of contracting an occupational illness or which, by reason of that risk, endangers the pregnant woman or the foetus to a greater degree.

...

8. work exposing them to an increased risk of accident, in particular the risk of falling or tripping over.

...'

8 Paragraph 5(1) of the Mutterschutzgesetz provides:

'A pregnant woman must inform her employer of the pregnancy and probable date of confinement as soon as she knows she is pregnant. At her employer's request she must produce a doctor's or midwife's certificate. The employer must immediately inform the supervising authority of the notification of pregnancy but may not inform others without authorisation.'

Facts and dispute in the main proceedings

9 From 26 August 1994 to 31 August 1995 Ms Mahlburg was employed as a nurse by the Rostock University Heart Surgery Clinic of the *Land* Mecklenburg-Vorpommern under a fixed-term contract. From February 1995 she tried to secure a contract for an indefinite period. She was supported by the matron, who submitted a request to the University's personnel department that Ms Mahlburg's employment contract be converted into a contract for an indefinite period. Having been informed that employment for an indefinite period was only possible if there was a specific vacancy in that type of post, Ms Mahlburg applied, on 1 June 1995, for two posts for an indefinite period which had been internally advertised.

10 The posts were to be taken up immediately or as soon as possible and the duties to be performed were described as follows:

'— The person appointed will be employed in the operating-theatre in shifts;

— Preparation in accordance with instructions and supervision of all sterile instruments and medicines required for operations;

— Handling of instruments during operations'.

11 In addition, one of the advertisements required a fully qualified operating-theatre nurse and the other a fully qualified nurse with operating-theatre experience.

12 On 1 June 1995, the date on which she applied for the posts, Ms Mahlburg was pregnant. The pregnancy had been confirmed on 6 April 1995. On 13 July 1995 she gave written notice thereof to her employer, to whom she had in the meantime applied for employment for an indefinite period. Following that letter, in order to comply with the Mutterschutzgesetz, the defendant in the main proceedings transferred her to another internal post. From then until the end of her fixed-term contract Ms Mahlburg was no longer employed as a nurse in the operating-theatre but employed on other nursing activities, that is to say activities which did not involve any risk of infection.

13 On 18 September 1995 the defendant in the main proceedings decided not to appoint Ms Mahlburg to either of the posts, citing the following reason:

'The two posts advertised were for operating-theatre nurses; the decision not to appoint pregnant women to those posts does not constitute discrimination on the ground of pregnancy but reflects legal requirements. Paragraphs 3 to 5 of the Mutterschutzgesetz expressly prohibit employers from employing pregnant women in areas in which they would be exposed to the harmful effects of dangerous substances. As a result of those legal prohibitions your application for the post of operating-theatre nurse could not be taken into consideration'.

14 Ms Mahlburg appealed against the rejection of her application to the Arbeitsgericht (Labour Court) Rostock, claiming that the refusal to give her an employment contract for an indefinite period and the grounds for that refusal

constituted unlawful discrimination on grounds of sex within the meaning of Paragraph 611a of the BGB and Article 2 of the Directive.

15 By decision of 15 April 1997 the Arbeitsgericht Rostock dismissed Ms Mahlburg's case. On appeal against that decision to the Landesarbeitsgericht Ms Mahlburg reiterated her arguments, whilst the defendant in the main proceedings contended that its refusal to conclude an employment contract with her did not constitute unlawful discrimination on grounds of sex since the decision not to do so resulted from the provisions of the Mutterschutzgesetz which prohibited it from employing Ms Mahlburg under the conditions applicable to the vacant posts: the defendant in the main proceedings maintained that in the circumstances it could not be required to conclude a contract of employment with her.

16 It is clear from the documents before the Court that the Landesarbeitsgericht takes the same view as the Arbeitsgericht, namely that under the case-law of the Bundesarbeitsgericht (Federal Labour Court) the defendant in the main proceedings is not in breach of the principle of equal treatment for men and women referred to in Paragraph 611a of the BGB. According to that case-law, Paragraph 611a of the BGB does not preclude an employer from deciding not to appoint a pregnant applicant to a post on the ground that the fact that pregnant women may not do certain work would prevent the applicant being employed, from the outset, in the post to be filled.

17 The Landesarbeitsgericht nevertheless added that Paragraph 611a of the BGB, which transposes the Directive into German law, must be interpreted in conformity with Community law. It expresses doubt as to the compatibility of the interpretation consistently given to Paragraph 611a of the BGB with Article 2 of the Directive.

The question referred to the Court

18 In those circumstances the Landesarbeitsgericht Mecklenburg-Vorpommern decided to stay proceedings and to refer to the Court for a preliminary ruling the following question:

'Is there unlawful discrimination on grounds of sex within the meaning of Article 2(1) of Directive 76/207/EEC of 9 February 1976 where an employer does not employ an applicant in a vacant post, which she is qualified to hold, because she is pregnant and cannot from the outset and for the duration of her pregnancy be employed in the post, which is intended to be occupied permanently, because of a prohibition on employment under the Mutterschutzgesetz?'

Consideration of the question referred to the Court

19 By its question the national court is asking essentially whether Article 2(1) of the Directive precludes a refusal to appoint a pregnant woman to a post for an indefinite period on the ground that a legal prohibition on employment attaching to the condition of pregnancy prevents her from being employed in that post from the outset and for the duration of the pregnancy.

20 As the Court has observed, only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex (Case C-177/88 *Dekker* [1990] ECR I-3941, paragraph 12).

21 It must, however, be pointed out that, in contrast to the *Dekker* case, cited above, the unequal treatment in a case such as the present is not based directly on the

woman's pregnancy but on a statutory prohibition on employment attaching to that condition.

22 That prohibition, imposed by the Mutterschutzgesetz, is based on Article 2(3) of the Directive, according to which that directive is to be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

23 The question to be considered, therefore, is whether the Directive allows an employer not to conclude an employment contract for an indefinite period on account of the fact that compliance with the prohibition on pregnant women's employment would prevent the woman carrying out, from the outset, the work in the post to be filled.

24 It must be pointed out, first of all, that the Court has held that dismissal of a pregnant woman recruited for an indefinite period cannot be justified on grounds relating to her inability to fulfil a fundamental condition of her employment contract. The availability of an employee is necessarily, for the employer, a precondition for the proper performance of the employment contract. However, the protection afforded by Community law to a woman during pregnancy and after childbirth cannot be dependent on whether her presence at work during maternity is essential to the proper functioning of the undertaking in which she is employed. Any contrary interpretation would render ineffective the provisions of the Directive (Case C-32/93 *Webb* [1994] ECR I-3567, paragraph 26).

25 Secondly, a statutory prohibition on night-time work by pregnant women, which is in principle compatible with Article 2(3) of the Directive, cannot, however, serve as a basis for terminating a contract for an indefinite period (see to that effect Case C-421/92 *Habermann-Beltermann* [1994] ECR I-1657, paragraphs 18 and 25). Such a prohibition takes effect only for a limited period in relation to the total length of the contract (*Habermann-Beltermann*, cited above, paragraph 23).

26 Lastly, the Court has held, in Case C-136/95 *Thibault* [1998] ECR I-2011, paragraph 26, that the exercise of the rights conferred on women under Article 2(3) of the Directive cannot be the subject of unfavourable treatment regarding their access to employment or their working conditions and that, in that light, the result pursued by the Directive is substantive, not formal, equality.

27 It follows from that case-law that the application of provisions concerning the protection of pregnant women cannot result in unfavourable treatment regarding their access to employment, so that it is not permissible for an employer to refuse to take on a pregnant woman on the ground that a prohibition on employment arising on account of the pregnancy would prevent her being employed from the outset and for the duration of the pregnancy in the post of unlimited duration to be filled.

28 At the hearing observations were put forward concerning the possible financial consequences of an obligation to take on pregnant women, in particular for small and medium-sized undertakings.

29 The Court has already held, in that regard, that a refusal to employ a woman on account of her pregnancy cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave (*Dekker*, cited above, paragraph 12). The same conclusion must be drawn as regards the financial loss caused by the fact that the woman appointed cannot be employed in the post concerned for the duration of her pregnancy.

30 The answer must therefore be given that Article 2(1) and (3) of the Directive precludes a refusal to appoint a pregnant woman to a post for an indefinite period on the ground that a statutory prohibition on employment attaching to the condition of pregnancy prevents her from being employed in that post from the outset and for the duration of the pregnancy.

Costs

31 The costs incurred by the Finnish Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Landesarbeitsgericht Mecklenburg-Vorpommern by order of 16 April 1998, hereby rules:

Article 2(1) and (3) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions precludes a refusal to appoint a pregnant woman to a post for an

indefinite period on the ground that a statutory prohibition on employment attaching to the condition of pregnancy prevents her from being employed in that post from the outset and for the duration of the pregnancy.

Kapteyn Hirsch Ragnemalm

Delivered in open court in Luxembourg on 3 February 2000.

R. Grass

Registrar

J.C. Moitinho de Almeida

President of the Sixth Chamber